Office - Supreme Court, U.S.
FILED
OCT 22 1984
ALEXANDER L. STEVAS,
CLERK

Nos. 84-237, 84-238 and 84-239

In the Supreme Court of the United States

OCTOBER TERM, 1984

YOLANDA AGUILAR, ET AL., APPELLANTS

v.

BETTY-LOUISE FELTON, ET AL.

SECRETARY, UNITED STATES DEPARTMENT OF EDUCATION, APPELLANT

v.

BETTY-LOUISE FELTON, ET AL.

CHANCELLOR OF THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, APPELLANT

v.

BETTY-LOUISE FELTON, ET AL.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE SECRETARY OF EDUCATION

REX E. LEE
Solicitor General

RICHARD K. WILLARD
Acting Assistant Attorney General

PAUL M. BATOR
Deputy Solicitor General

MICHAEL W. MCCONNELL
Assistant to the Solicitor General

ANTHONY J. STEINMEYER
MICHAEL JAY SINGER
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether Title I of the Elementary and Secondary Education Act of 1965, which authorizes federal funding of remedial education for educationally deprived children (in public or private schools) in low income areas, violates the Establishment Clause of the First Amendment insofar as it authorizes the funding of secular remedial classes taught by public school teachers under public school control on the premises of religious schools.

PARTIES TO THE PROCEEDING

The Secretary of Education and the Chancellor of the Board of Education of the City of New York were named as defendants and were appellees in the court of appeals. Yolanda Aguilar, Lillian Colon, Miriam Martinez, and Belinda Williams intervened as defendants in the district court and were appellees in the court of appeals. Betty-Louise Felton, Charlotte Green, Barbara Hruska, Meryl A. Schwartz, Robert H. Side, and Allen H. Zelon were the plaintiffs in the district court and appellants in the court of appeals.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Constitutional, statutory, and regulatory provisions involved	2
Statement	2
Introduction and summary of argument	15
Argument:	
New York's Title I program of remedial educational services for educationally deprived children, provided by public school professionals on private school premises, does not violate the Establishment Clause	20
A. This Court has appellate jurisdiction under 28 U.S.C. 1252	20
B. The Title I program of on-premises instruction for disadvantaged nonpublic school students has, as the court of appeals recognized, "done much good, and little, if any, detectable harm"	22
C. An analysis of the record demonstrates that New York's Title I program has a legitimate secular purpose, does not impermissibly advance religion, and has not occasioned an excessive entanglement between Church and State	28
1. Purpose	28
2. Effect	28
3. Entanglement	33
4. The authority of *Meek* v. *Pittenger*	39
D. The court of appeals' reasons for refusing to consider the evidentiary record were misconceived	44

Argument—Continued: Page

E. To deny comparable services to nonpublic school students would be inconsistent with the Religion Clauses' principles of evenhandedness and accommodation 47

Conclusion 48

TABLE OF AUTHORITIES

Cases:

Abington School District v. *Schempp*, 374 U.S. 203 27
Americans United for the Separation of Church & State v. *Blanton*, 433 F. Supp. 97, aff'd, 434 U.S. 803 29
Ashwander v. *Tennessee Valley Authority*, 297 U.S. 288 45
Bell v. *Kentucky*, cert. granted, No. 83-1798 (Oct. 1, 1984) 32
Bell v. *New Jersey*, No. 81-2125 (May 31, 1983) 3
Board of Education v. *Allen*, 392 U.S. 236 ..... 24, 29, 31, 45, 46
Bradfield v. *Roberts*, 175 U.S. 291 31
Brown v. *Board of Education*, 347 U.S. 483 22
California v. *Grace Brethren Church*, 457 U.S. 393 21
Committee for Public Education & Religious Liberty v. *Nyquist*, 413 U.S. 756 ..... 29, 31, 38, 43
Committee for Public Education & Religious Liberty v. *Regan*, 444 U.S. 646 ..... 28, 30, 31, 34, 41, 45
Everson v. *Board of Education*, 330 U.S. 1 ..... 24, 31, 46
Flast v. *Cohen*, 392 U.S. 83 21
Lemon v. *Kurtzman*, 403 U.S. 602 .... 31, 33, 35, 37, 38, 39
Lynch v. *Donnelly*, No. 82-1256 (Mar. 5, 1984) .. 29, 36, 38, 43, 47
Marsh v. *Chambers*, No. 82-23 (July 5, 1983) 27, 31, 36
McLucas v. *DeChamplain*, 421 U.S. 21 21
Meek v. *Pittenger*, 421 U.S. 349 ..... *passim*
Mueller v. *Allen*, No. 82-195 (June 29, 1983) 28, 29, 30, 31, 34, 46
Pierce v. *Society of Sisters*, 268 U.S. 510 47

Cases—Continued: Page

Public Funds for Public Schools v. *Marburger*, 358 F. Supp. 29, aff'd, 417 U.S. 961 39
Roemer v. *Board of Public Works*, 426 U.S. 736 31
Schall v. *Martin*, No. 82-1248 (June 4, 1984) 3
School District of Grand Rapids v. *Ball*, cert. granted, No. 83-990 (Feb. 27, 1984) 10
Sherbert v. *Verner*, 374 U.S. 398 47
Sloan v. *Lemon*, 413 U.S. 825 29
Tilton v. *Richardson*, 403 U.S. 672 31
Trustees of Dartmouth College v. *Woodward*, 17 U.S. (4 Wheat.) 518 45
United States v. *Clark*, 445 U.S. 23 21
United States v. *Darusmont*, 449 U.S. 292 21
United States v. *Rock Royal Co-operative, Inc.*, 307 U.S. 533 21
Walz v. *Tax Commission*, 397 U.S. 664 ..... 29, 31, 34, 38
Wheeler v. *Barrera*, 417 U.S. 402 ..... *passim*
Widmar v. *Vincent*, 454 U.S. 263 ..... 24, 29, 46, 47
Wolman v. *Walter*, 433 U.S. 229 ..... 28, 30, 32, 37, 39, 40
Zorach v. *Clauson*, 343 U.S. 306 ..... 24, 46

Constitutions, statutes and regulations:

U.S. Const.:
Amend. I 20, 27, 36
Establishment Clause 17, 18, 20, 21, 27, 36, 46, 47
Free Exercise Clause 47
Religion Clauses 20, 46, 47
N.Y. Const. Art. XI, § 3 26
Education Consolidation and Improvement Act of 1981, Ch. 1, Pub. L. No. 97-35, 95 Stat. 463, 20 U.S.C. 3801 *et seq.* 2, 6
20 U.S.C. 3801 ..... 2, 6
20 U.S.C. 3803 2-3
20 U.S.C. 3805(b) 3
20 U.S.C. 3806 ..... 2, 6
20 U.S.C. 3806(a) 5, 6, 42
20 U.S.C. 3806(b) 5
20 U.S.C. 3807(b) 3, 9, 32
20 U.S.C. 3872 3

Constitutions, statutes and regulations—Continued: Page

Elementary and Secondary Education Act of 1965, Tit. I, 20 U.S.C. 2701 *et seq.* 2, 20, 22
20 U.S.C. 2701 2
20 U.S.C. 2711-2713 3
20 U.S.C. 2721-2722 3
20 U.S.C. 2736(c) 32
20 U.S.C. 2740 2
20 U.S.C. 2740(a) 5, 6
20 U.S.C. 2740(b) 5, 11
20 U.S.C. 2761-2763 3
20 U.S.C. 2771-2772 3
20 U.S.C. 2781-2783 3
20 U.S.C. 2791-2792 3
20 U.S.C. 2841-2844 3
20 U.S.C. 2851-2854 3
Judiciary Act of 1937, ch. 754, §§ 2, 3, 50 Stat. 752 21
20 U.S.C. (1976 ed.) 241f(b) 5
20 U.S.C. (1976 ed.) 241j 5
28 U.S.C. 1252 ..... 18, 20, 21
28 U.S.C. 2103 22
28 U.S.C. (1970 ed.) 2282 21
Pub. L. No. 93-380, 88 Stat. 484 *et seq.*:
§ 101, 88 Stat. 497-499 5
§ 821, 88 Stat. 599 4
Pub. L. No. 95-561, § 101, 92 Stat. 2171-2172 6
Pub. L. No. 98-139, § 209, 97 Stat. 888 8
34 C.F.R.:
Pt. 200 6
Section 200.3(b) 3
Section 200.62 32
Sections 200.70-200.85 6
Section 200.70(a)(1) 6
Section 200.70(b) 6
Section 200.70(c) 6
Section 200.70(d)(1) 7
Section 200.72(a) 7, 9, 32
Section 200.73(a) 7, 20
Section 200.73(b) 7, 9

Constitutions, statutes and regulations—Continued: Page

Section 200.72(b)(1) 7
Section 200.72(b)(2) 7
Section 200.74(a) 8, 32
Section 200.75 8
45 C.F.R. 116.19(b) (1974) 5

Miscellaneous:

111 Cong. Rec. 5747-5748 (1965) 7
H.R. Rep. 95-1137, 95th Cong., 2d Sess. (1978) ..2, 3, 4, 5, 22, 28
S. Rep. 89-146, 89th Cong., 1st Sess. (1965) .....*passim*
S. Rep. 91-634, 91st Cong., 2d Sess. (1970) 32
S. Rep. 93-763, 93d Cong., 2d Sess. (1974) 5, 24
S. Rep. 95-856, 95th Cong., 2d Sess. (1978) 4

In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-237

YOLANDA AGUILAR, ET AL., APPELLANTS

v.

BETTY-LOUISE FELTON, ET AL.

No. 84-238

SECRETARY, UNITED STATES DEPARTMENT OF EDUCATION, APPELLANT

v.

BETTY-LOUISE FELTON, ET AL.

No. 84-239

CHANCELLOR OF THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, APPELLANT

v.

BETTY-LOUISE FELTON, ET AL.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE SECRETARY OF EDUCATION

OPINIONS BELOW

The opinion of the court of appeals (J.S. App. 1a-54a) is reported at 739 F.2d 48. The opinion of the district court (J.S. App. 55a-57a) is unreported. The opinion in *National Coalition for Public Education & Religious Liberty* v. *Harris* (J.S. App. 60a-103a), on which the district court relied, is reported at 489 F. Supp. 1248.

JURISDICTION

The judgment of the court of appeals (J.S. App. 104a-105a) was entered on July 9, 1984. A notice of appeal (J.S. App. 106a-107a) was filed on August 2, 1984. The appeal was docketed on August 13, 1984, and the Court, on October 9, 1984, postponed further consideration of jurisdiction to the hearing on the merits. The jurisdiction of this Court is invoked under 28 U.S.C. 1252.

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The relevant constitutional, statutory, and regulatory provisions are set out at J.S. App. 108a-127a.

STATEMENT

1. a. Title I of the Elementary and Secondary Education Act of 1965, 20 U.S.C. 2701 *et seq.*, is the "cornerstone" of the national effort to provide special educational assistance to needy children. H.R. Rep. 95-1137, 95th Cong., 2d Sess. 4 (1978). Over the almost 20 years of its operation, Title I has provided federal grants-in-aid "to local educational agencies serving areas with concentrations of children from low-income families to expand and improve their educational programs by various means * * * which contribute particularly to meeting the special educational needs of educationally deprived children." 20 U.S.C. 2701.[1]

---

[1] Effective July 1, 1982, Title I was superseded by Chapter 1 of the Education Consolidation and Improvement Act of 1981, 20 U.S.C. 3801 *et seq.* Chapter 1 continues to provide federal financial assistance to meet the special educational needs of the educationally deprived children served under Title I while, at the same time, eliminating burdensome and unnecessary federal supervision, direction, and control. See 20 U.S.C. 3801. Although Chapter 1 generally contains fewer and less restrictive program requirements than Title I, the provisions concerning the participation of children in private schools are virtually identical. Compare 20 U.S.C. 2740 (former Title I provision) with 20 U.S.C. 3806 (current Chapter 1 provision). See also J.S. App. 3a n.1. Moreover, Chapter 1, at 20

Title I was designed by Congress to "'bring better education to millions of disadvantaged youth who need it most.'" S. Rep. 89-146, 89th Cong., 1st Sess. 5 (1965) (citation omitted). Educational services typically made available under Title I include remedial reading, remedial mathematics, and English as a second language. See H.R. Rep. 95-1137, *supra*, at 6. By helping these children develop these basic skills, it is hoped that the cycle of poverty can be broken at its source. S. Rep. 89-146, *supra*, at 5.

Local programs must satisfy specific statutory criteria in order to qualify for Title I funds. 20 U.S.C. 3805(b). The programs must provide services to students (i) who are educationally deprived, that is, who perform at a level below normal for their age (see 34 C.F.R. 200.3(b)), and (ii) who live in an area that has a high concentration of families with incomes below the poverty level. 20 U.S.C. 3805(b). The Title I funds may be used only to provide services that otherwise would not be available to the participating students. 20 U.S.C. 3807(b).[2]

Since passage of Title I in 1965, it has been universally recognized as the largest and most successful federal educational effort. The program, which typically involves special instruction, small classes, and time with specially trained teachers (H.R. Rep. 95-1137, *supra*,

---

U.S.C. 3803, expressly incorporates by reference several sections from Title I, as follows: 20 U.S.C. 2711-2713, 2721-2722, 2761-2763, 2771-2772, 2781-2783, 2791-2792, 2841-2844, 2851-2854. Because there are no material differences between the two statutes with respect to the issues in this litigation, and because the declaratory and injunctive relief ordered by the court of appeals (see J.S. App. 54a) is not affected by the changes made by Chapter 1, this case is not moot. See, *e.g.*, *Schall* v. *Martin*, No. 82-1248 (June 4, 1984), slip op. 2 n.2. Like the court of appeals, we will continue to refer to the program as "Title I."

[2] Misapplication of Title I funds by state and local educational agencies subjects those funds to recoupment by the Secretary of Education. See *Bell* v. *New Jersey*, No. 81-2125 (May 31, 1983). In addition, a state or local authority's failure to comply with program requirements could result in the Secretary's withholding of funds. See 20 U.S.C. 3872.

at 6), has been successful in reaching "areas that have the highest proportions of children from low-income families" (S. Rep. 95-856, 95th Cong., 2d Sess. 7 (1978); H.R. Rep. 95-1137, *supra*, at 5), and has been "extremely effective in enhancing * * * achievement." *Id.* at 6.[3] For example, participating first graders studied during the period 1975-1978 registered reading gains averaging 12 months, and mathematics gains averaging 11 months, during seven months of Title I instruction. Third graders gained an average of eight months in reading and 12 months in mathematics. These compare with ordinary gains of only seven months for each school year of instruction for disadvantaged children not served by Title I. H.R. Rep. 95-1137, *supra*, at 6. In contrast to earlier studies showing that disadvantaged students "fall more and more behind in their achievement levels," students participating in Title I tended to keep pace with "their less-needy, unassisted peers * * *, and in some instances [achieved] dramatic improvements in reading." *Id.* at 6-7.

These results confirm that Title I has been, as hoped, "a very potent instrument to be used in the eradication of poverty and its effects." S. Rep. 89-146, *supra*, at 5. See H.R. Rep. 95-1137, *supra*, at 7.

b. The equitable participation of eligible children, whether they attend public or nonpublic schools, has been a fundamental principle of Title I since its inception. Congress recognized that many families in low-income urban areas send their children to nonpublic schools. See *Wheeler* v. *Barrera*, 417 U.S. 402, 405-406 (1974). Congress therefore specifically provided that eligible schoolchildren were not to be excluded from the benefits of Title I merely because they attend private rather than

---

[3] The conclusions of the House and Senate committees quoted in text were predicated largely on a comprehensive, three-year study of the effects of Title I, undertaken by the National Institute of Education pursuant to Pub. L. No. 93-380, § 821, 88 Stat. 599. The results of the study were corroborated by other sources and studies canvassed by the congressional committees.

public school. See *id.* at 406. 20 U.S.C. 2740(a), 3806 (a) provides:

> To the extent consistent with the number of educationally deprived children in the school district of the local educational agency who are enrolled in private elementary and secondary schools, such agency shall make provisions for including special educational services and arrangements * * * in which such children can participate * * *.

This provision was interpreted to mean that nonpublic school students must receive services that are "comparable in quality, scope and opportunity for participation to those provided to public school children with needs of equally high priority." *Wheeler* v. *Barrera*, 417 U.S. at 407 (citation omitted); see 45 C.F.R. 116.19(b) (1974).

The question of providing services to students in nonpublic schools has been revisited by later Congresses. Each has, without significant dissent or controversy, decided to maintain or strengthen the provisions for equitable participation of nonpublic school children in Title I.

In 1974, Congress became concerned that the then-existing mechanism for enforcement of the nonpublic school student participation requirement (disapproval of grant applications or withholding of funds under 20 U.S.C. (1976 ed.) 241f(b), 241j) was not adequate. S. Rep. 93-763, 93d Cong., 2d Sess. 29-30 (1974). Congress therefore enacted a new "by-pass" provision that would require the Secretary (then the Commissioner of Education) to supply services to eligible nonpublic school students in instances where the local educational agency was prohibited by state or local law, or otherwise substantially failed, to do so. Pub. L. No. 93-380, § 101, 88 Stat. 497-499; see 20 U.S.C. 2740(b), 3806(b).

In 1978, Congress again considered the matter, having been informed by a National Institute of Education study that many children in nonpublic schools were not being served adequately. H.R. Rep. 95-1137, *supra*, at

32-33. Congress's solution (Pub. L. No. 95-561, § 101, 92 Stat. 2171-2172) was to stiffen the requirement of comparability. Now, the statute requires (20 U.S.C. 2740(a), 3806(a) (emphasis added)) that:

> Expenditures for educational services and arrangements pursuant to this section for educationally deprived children in private schools shall be *equal* (taking into account the number of children to be served and the special educational needs of such children) to expenditures for children enrolled in the public schools of the local educational agency.

The requirement of participation by nonpublic school children has never encountered significant opposition or controversy, and there has never been a serious attempt in Congress to eliminate it.[4]

c. The Department of Education's regulations implementing the Title I program (now Chapter 1) are set forth in 34 C.F.R. Pt. 200. Several of these regulations specifically address participation in Title I programs by educationally deprived children enrolled in private schools. See 34 C.F.R. 200.70-200.85. The regulations require that the local public school boards that administer these programs (denominated by the regulations as "local educational agencies" or "LEAs") shall provide eligible private school children with Title I services that "assure participation on an equitable basis" (34 C.F.R. 200.70(a)(1)). The LEA must allow such children "to participate in a manner that is consistent with the[ir] number and special educational needs" (34 C.F.R. 200.70 (b)). While so doing, however, the LEA must "exercise administrative direction and control over [Title I] funds and property" used in such programs (34 C.F.R. 200.70 (c)). See S. Rep. 89-146, *supra*, at 12. The Title I serv-

---

[4] In 1981, Congress substantially streamlined the program by enacting the Education Consolidation and Improvement Act of 1981, Pub. L. No. 97-35, §§ 552-558, 95 Stat. 464-469, 20 U.S.C. 3801-3807. Although the purpose of this Act was to eliminate needlessly prescriptive federal requirements (see 20 U.S.C. 3801), Congress carried forward the requirement of participation by nonpublic school children in full force and effect. See 20 U.S.C. 3806.

ices to private school children must be provided either by public employees or by contract with a person or organization "independent of the private school and of any religious organizations" (34 C.F.R. 200.70(d)(1)).

Several regulatory provisions are specifically designed to effectuate the congressional intent that no financial aid or services be provided "to a private institution," as distinguished from the educationally deprived *schoolchildren* who attend a private institution. See S. Rep. 89-146, *supra*, at 11. Thus, one provision stipulates, in accordance with express congressional intent (S. Rep. 89-146, *supra*, at 12), that Title I funds may be used only "to provide services that supplement the level of services that would, in the absence of [Title I] services, be available to children in private schools" (34 C.F.R. 200.72(a)). Another provision specifies that Title I funds may be used only "to meet the special educational needs of children in private schools" and not to meet any "needs of the private schools" themselves or any "general needs" of the private school children (34 C.F.R. 200.72(b), (1) and (2)).

Although the LEAs are permitted to make public employees available on the premises of private schools, this approach may be used only as "necessary to provide equitable [Title I] services" and only "[i]f those services are not normally provided by the private school" (34 C.F.R. 200.73(a) and (b)). This provision accords with Congress's original statement of its intent. Congress expressly indicated that a program of assistance by public school teachers to nonpublic school children in their own schools would be proper, but "only to provide specialized services which contribute particularly to meeting the special educational needs of educationally deprived children (such as therapeutic, remedial or welfare services) and only where such specialized services are not normally provided by the nonpublic school" (S. Rep. 89-146, *supra*, at 12). See also 111 Cong. Rec. 5747-5748 (1965) (remarks of Reps. Carey and Perkins, managers of the House bill).

The regulations also provide that "a public agency must keep title to and exercise continuing administrative control of all equipment and supplies that the LEA acquires with [Title I] funds" (34 C.F.R. 200.74(a)). This provision, too, was anticipated by Congress in the original legislative history. S. Rep. 89-146, *supra*, at 12. Finally, the regulations expressly prohibit use of Title I funds "for repairs, minor remodeling, or construction of private school facilities" (34 C.F.R. 200.75). Cf. S. Rep. 89-146, *supra*, at 11.

d. According to the most recent data in the record, over $3 billion ($3,104,317,000) was appropriated for Title I program expenditures in Fiscal Year 1982 (J.A. 228; C.A. App. A251).[5] During the 1980-1981 school year, Title I services were provided to 5,170,935 public school children and 192,994 private school children (*ibid.*). Thus, about 3.7% of the Title I students were in private schools. And approximately $105,200,000—about 4% of the total Fiscal Year 1980 appropriation—was expended on Title I services for children attending private schools (*ibid.*).

2. a. This case concerns the largest Title I program in the nation, that operated by the Board of Education of the City of New York. This program has been in operation for 18 years, and the facts concerning it have been developed in detail in the record of this case. Those facts are essentially undisputed (J.S. App. 10a, 56a n.1).

Approximately 13% of the over 300,000 students eligible for Title I programs in New York City attend nonpublic schools, most of which are religiously oriented (J.S. App. 7a; J.A. 38, 81-82; C.A. App. A32, A80-A81). Title I students are taught remedial reading, remedial mathematics, and English as a second language and are

---

[5] The Title I appropriation for Fiscal Year 1984 is $3,480,000,000. Pub. L. No. 98-139, § 209, 97 Stat. 888.

provided a clinical and guidance program designed to enhance achievement in those subjects (J.S. App. 10a-11a). In accordance with Title I and its implementing regulations (see 20 U.S.C. 3807(b); 34 C.F.R. 200.72(a), 200.73(b)), Title I funds are used to provide supplemental educational services for nonpublic school students only when these are not available in the nonpublic school.

Initially, the Board did not offer Title I instruction on the premises of nonpublic schools. Instead, it required nonpublic school students who wished to participate in Title I programs to travel to public schools after regular school hours. This approach proved, in the Board's view, to be "a total failure," largely because of the participants' fatigue and lack of attendance. J.A. 63; C.A. App. A60.[6] The Board then decided to hold some Title I classes in the nonpublic schools, but after regular school hours. *Ibid.* This approach proved unsuccessful for similar reasons: "both students and teachers were tired, * * * there was concern about the safety of children traveling home after dark or in inclement weather, and * * * communication between Title I teachers and other professionals and the regular classroom teachers of the nonpublic schools was virtually impossible" (J.S. App. 8a). See J.A. 64; C.A. App. A60.

The Board then considered holding the remedial classes for nonpublic school students in the public schools during school hours. This plan was abandoned because of concerns that it would violate the New York Constitution (J.S. App. 8a; J.A. 64; C.A. App. A60-A61). In addition, a study in 1977-1978 showed that the transportation and other noninstructional costs of conducting Title I classes for nonpublic school students at sites away from

---

[6] These factors are of more than usual importance because, as evidence in the record shows, educationally deprived children generally have less than average motivation to participate in school programs. The added degree of fatigue and inconvenience decreases the receptivity of these children who already have learning problems, making it very unlikely that the Title I instruction would be educationally effective. Dane Affidavit ¶ 14, DX U, Tab A-1, at 6.

their schools would have amounted to $4.2 million—an amount equivalent to 42% of the entire Title I budget for nonpublic school children.[7] In order to absorb these costs, the Board would have had to deny Title I services to over 5,000 children who had been receiving them (J.S. App. 8a-9a, 72a-73a; J.A. 66-67; C.A. App. A63-A64).[8]

New York's experience with attempts to provide Title I services off the premises of the participants' regular schools, or after regular school hours, has not been unique. Many other school districts have similarly found that on-premises programs are virtually the only effective means for providing comparable services to nonpublic school children. See *Barnes* v. *Bell*, Civ. No. C-80-0501-L(B) (W.D. Ky. filed Oct. 1, 1980); *Wamble* v. *Bell*, Civ. No. 77-0254-CV-W-8 (W.D. Mo. filed Apr. 4, 1977); Dane Affidavit ¶¶ 12-17, DX U, Tab A-1, at 6-9. And some communities providing state or local funds for assistance to nonpublic school students have had the same experience. See Brief for the United States at 10-11, *School District of Grand Rapids* v. *Ball*, cert. granted, No. 83-990 (Feb. 27, 1984). Indeed, it is significant that the Department of Education has, on at least one occasion, concluded after full investigation that Title I services provided at times other than during the school day "were not, and probably could not, be comparable in quality, scope and opportunity for participation, to services provided during the regular school hours". Missouri Study, J.A. 35; C.A. App. A29.[9]

---

[7] A study of the St. Louis, Missouri Title I program reached similar results. J.A. 68; C.A. App. A64.

[8] Because of the requirement of "comparability" (see page 5, *supra*), the cuts in service would affect public school children as well as those attending private schools.

[9] This conclusion was based on an investigation of the Title I program in Missouri, undertaken by the Office of Education after receipt of a written complaint by parents of nonpublic school students. The Missouri nonpublic school students received remedial instruction only outside of regular school hours. The investigation concluded that services were not comparable, because the conditions

After unsuccessfully "experimenting with [these] alternative programs" (J.S. App. 71a), New York decided, in 1966, to provide Title I instruction on the premises of nonpublic schools during school hours. All the teachers and other professionals who provide Title I services, with the exception of some physicians under special contract, are regular full-time employees of the Board (J.A. 46-47; C.A. App. A41-A42). Teachers who are willing are assigned by the Board to teach nonpublic school Title I students. The Board does not inquire into teachers' religious affiliations when making assignments. J.A. 48; C.A. App. A43. The undisputed evidence is that the vast majority (73%) of the Title I teachers work in nonpublic schools with a religious affiliation different from their own. J.A. 49-50; C.A. App. A44-A45; see J.S. App. 11a-12a, 74a. In addition, 78% of the teachers, and all of the non-teacher professionals, spend fewer than five days a week in any one school and work in more than one school in the course of the week. J.A. 49, 82; CA. App. A44, A80.

---

under which the services were provided led to poor attendance and poor quality services.

Attendance was poor because: students were "too fatigued" after a full day of school to attend the remedial program, the remedial classes conflicted with other activities, including after-school jobs or family chores, parents were reluctant to have their children remain at school until late in the day, the children often viewed the additional instructional time as "punishment," parents were concerned for the safety of their small children, and children were unwilling to attend on Saturdays. J.A. 35-36; C.A. App. A29-A30. Even those students who attended did not receive comparable services because of fatigue or lack of concentration and the difficulty of hiring a sufficient number of qualified specialists to provide services after the regular school day. J.A. 36; C.A. App. A30. Logistical difficulties, lack of coordination with regular teachers, and increased costs exacerbated these problems. J.A. 36-37; C.A. App. A30-A31.

As a result, the Office of Education found the Missouri program not "comparable," as the statute demands (*Wheeler* v. *Barrera*, 417 U.S. at 407-408, 415, 420-421), and the federal government undertook to provide services directly to Missouri nonpublic school students under the "by-pass" provisions of 20 U.S.C. 2740(b).

The New York on-premises program is designed to "'create[] the unusual situation in which an educational program may operate within the private school structure but be totally removed from the administrative control and responsibility of the private school'" (J.S. App. 14a (citation omitted)). Students for the program are picked, not by the private school, but by the Board. J.A. 50-51; C.A. App. A46. The Board issues Title I teachers detailed written and oral instructions that emphasize that they are independent public school employees who are in no way responsible to the nonpublic school authorities. J.A. 50; C.A. App. A45. The private school principals are also informed of the requirement that the Title I teachers' role be kept distinct from the schools' religious aspects. J.A. 59-60; C.A. App. A55-A56. Title I teachers are instructed not to introduce any religious matters into their programs. They are also instructed not to engage in team teaching or cooperative instructional activities. They may consult with a nonpublic school teacher about a student's needs, but, if they do, they are not to engage in any religious discussion. J.A. 50-52; C.A. App. A45-A47; see J.S. App. 12a, 74a.

Pursuant to instructions given by the Board to participating nonpublic schools, Title I teachers use classrooms that are specifically designated for Title I instruction and that are free from any religious symbols. J.A. 59; C.A. App. A55. The nonpublic schools are not reimbursed for classroom space. The materials used in the classes have no religious content. J.A. 56; C.A. App. A52. The Board retains title to the materials and equipment used in Title I classes. The teachers are instructed to keep the materials locked in storage cabinets when they are not in use; and the materials are subject to an annual inventory. J.A. 56-57; C.A. App. A52-A53; see J.S. App. 13a, 74a-75a.

Each Title I teacher is supervised by a field supervisor, employed by the Board, who is to make at least one unannounced visit a month to the Title I classroom. J.A. 53; C.A. App. A48. The field supervisors answer to the Board's program coordinators, who also make occa-

sional unannounced visits. In addition, the Board holds monthly training sessions for those employees serving as Title I professionals. No Title I teacher, in the entire time that on-premises instruction has been provided, has complained that nonpublic school authorities were attempting to interfere in his work for religious reasons; nor is there any recorded complaint that a teacher was injecting religious matters into a class. J.A. 52, 55, 80-81; C.A. App. A47, A50, A79; see J.S. App. 13a-14a, 87a.

b. The record shows that the disadvantaged children who have participated in New York's on-premises Title I program have made significant educational progress.

New York City's Title I Corrective Reading Program served 11,789 disadvantaged students in the nonpublic schools in the 1979-1980 school year. The program consisted of small group instruction by full-time public school reading specialists (in groups of 10 or fewer children), using multi-media as well as conventional reading materials. Participating students at all grade levels achieved gains in performance well above those of a nationally representative group. While the Title I nonpublic school students tested at the 14th to 18th percentile in reading comprehension prior to participation, at the end of the school year they had advanced to between the 27th and the 30th percentile. See Final Evaluation Report, J.A. 120-124; C.A. App. A127-A131.

New York City's Reading Skills Program, a one-on-one program for children with severe reading problems, served some 431 nonpublic school students during 1979-1980. The results here, too, were highly positive. The students advanced from between the 10th and 16th percentiles, to between the 22d and 32d percentiles. See Final Evaluation Report, J.A. 159-161; C.A. App. A171-A174. Similarly, the Corrective Mathematics Program, which served 8,547 nonpublic school students, and the English as a Second Language Program, which served 3,360 nonpublic school students, saw participants improve

their skills dramatically. See Final Evaluation Report, J.A. 89-91, 187-189; C.A. App. A90-A94, A205-A207.[10]

3. Appellees, six federal taxpayers, brought this suit in 1978 in the United States District Court for the Eastern District of New York. They contended that the Constitution prohibits public employees from providing remedial education on the premises of religious schools during regular school hours. They sought declaratory and injunctive relief against the operation of New York City's Title I program. Four individuals whose children attend private elementary schools in New York City and receive Title I educational assistance subsequently intervened as defendants (J.S. App. 9a-10a; see J.A. 2, 9-13; C.A. App. A2, A3-A7).

The district court stayed proceedings in this case pending the outcome of another suit, also challenging New York City's program of on-premises Title I instruction, which was pending before a three-judge court in the United States District Court for the Southern District of New York. *National Coalition for Public Education & Religious Liberty (PEARL)* v. *Harris*, 489 F. Supp. 1248, appeal dismissed for want of jurisdiction, 449 U.S. 808 (1980) (J.S. App. 60a-103a).[11] The three-judge court in *PEARL* unanimously upheld the constitutionality of the program. The parties to this case then stipulated that this case would be heard on the record developed in *PEARL*, as supplemented by various affidavits and documents (J.S. App. 10a, 56a).

The district court granted summary judgment for the defendants (J.S. App. 55a-59a). The court agreed with the reasoning of the three-judge court in *PEARL* and rejected the plaintiffs' argument that *Meek* v. *Pittenger*, 421 U.S. 349, 367-373 (1975), compelled the conclusion

---

[10] The final evaluation reports of these programs did not translate pupil improvements into percentile figures, but test scores indicated significant improvements relative to the nationally representative group.

[11] The appeal in *PEARL* was not timely filed. See C.A. Br. for Plaintiffs-Appellants at 3 n.*.

that the Title I program was unconstitutional (J.S. App. 56a-57a).

The court of appeals, relying principally on *Meek* v. *Pittenger*, *supra*, reversed (J.S. App. 1a-54a). The court did not question any of the factual conclusions reached by the district courts that had considered New York's Title I program (see *id.* at 10a). The court explicitly acknowledged the considerable good the program had accomplished (*id.* at 4a, 52a). The court nevertheless held that "the Establishment Clause, as it has been interpreted by the Supreme Court, constitutes an insurmountable barrier to the use of federal funds to send public school teachers and other professionals into religious schools to carry on instruction, remedial or otherwise" (J.S. App. 4a (citations omitted); see *id.* at 36a-39a, 50a-53a).

The court of appeals interpreted *Meek* as creating a per se rule that the supervision needed to ensure that public employees not further a religious school's religious purposes necessarily creates "a constitutionally excessive entanglement of church and state" (J.S. App. 36a (footnote omitted)). The court specifically stated that it was not ruling on "the merits of the argument" that the supervision of public school teachers in a nonpublic school did not, on this record, create an unconstitutional degree of entanglement (*id.* at 53a); it made clear that it simply felt itself to be bound by the dictates of *Meek*.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case touches on the national commitment to equal educational opportunity. It raises the question whether that commitment is hobbled by a constitutional rule that precludes Congress and the states from continuing a highly successful program to provide remedial education to disadvantaged children on an even-handed basis—including those whose beliefs lead them to exercise their constitutional right to attend private religious schools.

In a day when skepticism and controversy surround virtually every governmental undertaking, a remarkable consensus supports both the ends of this program and the

means adopted to achieve them. The purpose of Title I is to enhance equal opportunity—to give more Americans a chance to achieve the material and intellectual fulfillment that only education can provide. The method adopted is to enlarge access to specialized instruction in educational fundamentals. There is nothing fancy or trendy in these programs; they bring the basics (remedial English, reading, mathematics) to youngsters who are educationally handicapped by poverty and who otherwise would be deprived of this expert help because they attend schools that do not provide it.

The key to the program is that the aid is for *children*. It is not schools that are eligible, but children. And, from the beginning, Congress has been insistent that *all* children who need the program must have equal access to it, no matter what school they go to. A program that seeks to enlarge equal opportunity is not to be distributed in a way that discriminates.

It is in pursuit of these aims that the widely admired program at issue here has developed. For almost 20 years New York City, funded by the federal government, has been providing basic remedial education to educationally handicapped poor children—children who would otherwise go without it. More than 20,000 of these children attend private (including private religious) schools—as of course they have a right to do. New York has worked conscientiously to satisfy the statute's central command of equitable participation for all eligible children. And by a process of trial and error New York has discovered what common sense would in any event teach—that the program can be truly successful and cost-effective only if the remedial instruction takes place during school hours in the school that the child actually attends. In this setting of poverty and cultural deprivation, the chance that help will actually reach the student who needs it is dramatically impaired if the remedial instruction is available only at a distance or outside of normal hours. So New York has adopted the *educationally* correct and sensible solution: it has brought the remedial program to the schools that the eligible students actually attend.

And on this basis the program has flourished, an unquestionable success.

But the court of appeals tells us that all this must cease. That court concedes that this program "has done * * * much good and little, if any, detectable harm" (J.S. App. 52a), and that "other ways of using Title I funds for the benefit of students in religious schools * * * are almost certain to be less effective, more costly, or both" (*ibid.*). But we cannot have this admirable and desirable program because, we are told, the Constitution contains a rigid per se rule that the use of public funds for secular instruction by secular teachers under secular control on the premises of religiously oriented schools constitutes an "establishment" of religion.

The question we raise is: Why? Is this per se rule compelled by the language or history of the Establishment Clause? Nobody so asserts. Rather, the rule rests on a theory about facts. The theory is that publicly funded remedial instruction, provided to educationally disadvantaged children by public school teachers under public school control on premises borrowed from religious schools, will inevitably be subverted and turned to religious ends—unless there exists a level and intensity of surveillance over the enterprise that itself constitutes an impermissible "entanglement" between Church and State.

So we turn, then, to the facts. Is there a body of actual experience that has been put forward to support these empirical assertions? The record is clear: elaborate and conscientious inquiry has been made by two district courts into the actual New York experience. And that experience shows that the program has in fact done only what it is supposed to do—benefit the secular education of deprived youngsters—and has not been subverted or turned to religious or sectarian ends. Further, the record shows that this has been accomplished without any extraordinary or impermissible surveillance—that no detectable "entanglement" has *in fact* occurred. But, we are told by the court of appeals, the actual record of experience of the New York schools is irrelevant and may not be examined. Rather, the proposition that—

absent extraordinary and constitutionally impermissible precautions—the program will be turned to impermissible ends is simply to be assumed, a priori. And this, we are told, is required by this Court's cases.

In the face of this holding, our submission is straightforward. Nothing in the Constitution requires us to adopt the unwelcome rule that Congress and the states are rigidly disabled from rendering secular remedial assistance to educationally deprived children in their own schools. Nothing in this Court's cases should be read to impose on us the self-defeating ordinance that remedial English and mathematics can be brought to needy private school children only under conditions which guarantee that the effort is likely to be a costly failure. Nothing forces us to the perverse principle that actual facts and actual experience must be deemed irrelevant in determining whether a given program actually constitutes a threat to the values of the Establishment Clause.

1. We submit that an analysis of this record in light of this Court's decisions will reveal, as the district courts concluded, that New York's on-premises Title I program for nonpublic school students has a secular purpose, has a primary effect that neither advances nor inhibits religion, and occasions no excessive entanglement between governmental and religious authorities.[12] The question of purpose is, indeed, conceded: no one doubts that improving the education of needy youngsters is a worthy and legitimate governmental function. The question of effect, though not addressed by the court of appeals, was resolved in favor of the program by the district courts. The program maintains a thorough neutrality, providing educational assistance on an equal basis to all eligible children whether they attend public or private schools. It provides no direct or indirect assistance to the nonpublic schools themselves. Because the remedial instruction is provided directly to the participating students, and be-

[12] In Part A, *infra*, we set forward the reasons why this Court has appellate jurisdiction under 28 U.S.C. 1252. Appellees have not challenged the jurisdictional basis for this appeal.

cause only such instructional services as would not otherwise be available are federally funded, the schools reap no benefit. The Title I courses themselves are entirely secular, and the record shows that the Title I teachers have not allowed religious influences to affect their teaching.

2. The court of appeals held the program unconstitutional because of its potential for excessive entanglement. In particular, the court concluded that, under *Meek* v. *Pittenger*, 421 U.S. 349 (1975), the degree of surveillance of Title I teachers that would be needed to guarantee that religious influences did not insinuate themselves into the teaching would itself constitute excessive entanglement. However, the court did not find, and the record would not permit a finding, that the present level of surveillance *in fact* is extensive, let alone impermissibly "entangling." In the absence of a factual finding that more extensive surveillance would be needed in order to obviate impermissible effects, the court should have upheld the program.

Meek does not compel a contrary conclusion. *Meek* should not be read as committing this Court to a rigid per se rule against on-premises instruction. Indeed, decisions before and after *Meek* belie any such interpretation. And *Meek* itself involved a different program—one that lacked adequate guidance and safeguards to prevent controversies over the respective authority of Title I and private school personnel, that *required* the instruction of nonpublic school students to be conducted on the premises of private schools whether or not it would be educationally necessary, and that involved annual appropriations battles with attendant political divisiveness. Most importantly, the decision in *Meek* was made on the basis of an abstract claim of reliance on the good faith and professionalism of the teachers rather than, as here, on a 16-year documented history of successful avoidance of religious influences or entanglements.

3. The reasons given by the court of appeals for declining to assess its holding in light of the factual record are not persuasive. Indeed, they suggest that the court

of appeals has improperly reversed the burden of proof, in effect applying a presumption of unconstitutionality to this statutory program. Further, the court's approach seems quite contrary to the values of evenhandedness and accommodation that infuse the Religion Clauses. The effect of the decision below is to penalize and discourage the exercise of constitutional rights—certainly an ironic reading of the First Amendment.

ARGUMENT

NEW YORK'S TITLE I PROGRAM OF REMEDIAL EDUCATIONAL SERVICES FOR EDUCATIONALLY DEPRIVED CHILDREN, PROVIDED BY PUBLIC SCHOOL PROFESSIONALS ON PRIVATE SCHOOL PREMISES, DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE

A. This Court Has Appellate Jurisdiction Under 28 U.S.C. 1252

The court of appeals held that the Establishment Clause of the First Amendment forbids the expenditure of funds appropriated under Title I of the Elementary and Secondary Education Act of 1965, 20 U.S.C. 2701 *et seq.*, on remedial instruction for students of nonpublic religiously oriented schools, if that instruction occurs on the premises of those schools. As this Court has held (*Wheeler* v. *Barrera*, 417 U.S. 402, 422-423 (1974)) and as the court of appeals explicitly recognized (J.S. App. 6a n.2, 24a), Title I authorizes such expenditures. Indeed, the legislative history of Title I shows that Congress specifically contemplated on-premises instruction (S. Rep. 89-146, 89th Cong., 1st Sess. 12 (1965)), and a regulation specifies that such instruction is to be provided only "[t]o the extent necessary to" satisfy the statutory mandate that comparable services be supplied to public and nonpublic school students (34 C.F.R. 200.73(a)). The record in this case amply demonstrates that on-premises instruction was in fact required in order to satisfy this mandate.

Since the holding of the court of appeals is that the Constitution prevents Congress from achieving a central purpose of the statute—that private and public school students have equal access to remedial instruction—our submission is that the court of appeals has "held [Title I] unconstitutional as applied to a particular circumstance" (*United States* v. *Darusmont*, 449 U.S. 292, 293 (1981)) and an appeal lies to this Court under 28 U.S.C. 1252. See *California* v. *Grace Brethren Church*, 457 U.S. 393, 404-407 (1982). Cf. *United States* v. *Rock Royal Co-operative, Inc.*, 307 U.S. 533 (1939). Since the Secretary is a party to this litigation, he would be bound by a holding that an on-premises Title I program is unconstitutional. *McLucas* v. *DeChamplain*, 421 U.S. 21, 31 (1975). While the court of appeals did not explicitly state that Title I was unconstitutional as applied (as is normally required to found an appeal under Section 1252), this case is one of those unusual instances in which such a determination "was a necessary predicate to the relief" that is granted (*United States* v. *Clark*, 445 U.S. 23, 26 n.2 (1980)).[13]

We note that in *Flast* v. *Cohen*, 392 U.S. 83, 88-91 (1968), this Court held that a claim that New York City's Title I program violated the Establishment Clause —the same claim that is made by plaintiffs here—was properly brought before a three-judge court convened pursuant to 28 U.S.C. (1970 ed.) 2282. The interpretation of Section 2282 sheds light on the meaning of Section 1252 because Section 2282 provided for a three-judge court when an injunction was sought against the enforcement of an Act of Congress "on ground of unconstitutionality," and both Section 1252 and Section 2282 were enacted as part of the same statute (Judiciary Act of 1937, ch. 754, §§ 2, 3, 50 Stat. 752).

---

[13] In their complaint (J.A. 12; C.A. App. A7), appellees sought a declaration that "insofar as Title I of the Act authorizes the expenditure of federal funds to finance educational services in religious schools during school hours it is unconstitutional as violative of the Establishment Clause of the First Amendment."

If the Court determines that it lacks appellate jurisdiction in this case, we request that it decide this case on writ of certiorari (see 28 U.S.C. 2103). The importance and national impact of the question of constitutional law decided by the court of appeals warrants such review.

B. The Title I Program Of On-Premises Instruction For Disadvantaged Nonpublic School Students Has, As The Court Of Appeals Recognized, "Done Much Good, And Little, If Any, Detectable Harm"

This case raises important questions about our national commitment to equal educational opportunities for all of our country's children—whether rich or poor, gifted or slow, devout or indifferent—all alike. That commitment rests on insights that today command virtually unanimous assent: education, in our modern society, is indispensable to a successful and fulfilled life; it is a fundamental obligation of government to assure every child an equal opportunity to receive an adequate education; breaking the poverty-related barriers to education is central to breaking other aspects of the poverty cycle itself; this entails the creation of special educational programs for those children who start the course hobbled by the fetters of poverty and educational deprivation. See, *e.g.*, *Brown* v. *Board of Education*, 347 U.S. 483, 493 (1954).

Accordingly, Congress has established as a high national priority the provision of special educational assistance—especially in the basic skills of reading, language, and mathematics—to disadvantaged youngsters whose schools would not otherwise provide it. The "cornerstone" of this effort is Title I of the Elementary and Secondary Education Act of 1965, 20 U.S.C. 2701 *et seq.* (see H.R. Rep. 95-1137, *supra*, at 4), which is based on the recognition that there is "a close relationship between conditions of poverty and lack of educational development and poor academic performance." S. Rep. 89-146, 89th Cong., 1st Sess. 5 (1965)).

From the beginning, Congress has determined that otherwise qualified disadvantaged youngsters attending

nonpublic schools should be able to participate in Title I programs on an equitable basis; and successive Congresses have affirmed and strengthened this determination. See pages 5-6, *supra*. The concept of parity between public and private school students reflects two fundamental concerns.

First, Congress intended Title I to provide aid to *children*—not institutions—and recognized that many educationally disadvantaged students in low income areas attend nonpublic schools, often at great financial sacrifice to their families. To deny services to classes and categories of needy students would undermine the objectives of Title I. As this Court observed in *Wheeler* v. *Barrera*, 417 U.S. 402, 405-406 (1974) (emphasis in original; footnotes omitted):

> The Congress, by its statutory declaration of policy, and otherwise, recognized that all children from educationally deprived areas do not necessarily attend the public schools, and that, since the legislative aim was to provide needed assistance to educationally deprived *children* rather than to specific schools, it was necessary to include eligible private school children among the beneficiaries of the Act.

Second, Congress intended to treat all eligible children equally, thereby remaining neutral as between public and nonpublic schools. To deny Title I services to students who attend nonpublic schools would discriminate against some children—those exercising a constitutional right.

Indeed, Congress has placed an ever greater emphasis on equality as experience has shown that, in many instances, disadvantaged students in nonpublic schools were not receiving their fair share of Title I assistance. Thus, in 1978, Congress required for the first time that expenditures for eligible students in nonpublic schools shall be "equal" to expenditures for public school children. See pages 5-6, *supra*. The purpose of this was not to benefit religion or religious schools, but simply to ensure the "equitable participation of children enrolled in

nonpublic schools." S. Rep. 93-763, 93d Cong., 2d Sess. 30 (1974).

In guaranteeing equitable participation to all, Congress has followed the path set by *Everson* v. *Board of Education*, 330 U.S. 1 (1947), and *Board of Education* v. *Allen*, 392 U.S. 236 (1968), in which this Court held that "the Establishment Clause does not prevent a State from extending the benefits of state laws to all citizens without regard for their religious affiliation" (*id.* at 242). Cf. *Widmar* v. *Vincent*, 454 U.S. 263 (1981); *Zorach* v. *Clauson*, 343 U.S. 306, 313-314 (1952).

While insisting that disadvantaged nonpublic school students be permitted to participate equitably in the program, Congress has also been aware that programs of educational assistance to religiously oriented private school students must be carefully structured to avoid impermissible advancement of religion or excessive entanglement between Church and State. See S. Rep. 89-146, *supra*, at 11-12. Congress left decisions on the details of the Title I program to the discretion of local authorities (within statutory and regulatory limits). However, it anticipated that public school teachers would be made available to disadvantaged students on the premises of nonpublic schools, and specified that this may be done "only to provide specialized services which contribute particularly to meeting the special educational needs of educationally deprived children (such as therapeutic, remedial or welfare services) and only where such specialized services are not normally provided by the nonpublic school." *Ibid.* Congress expected that the program could thus be "interpreted and administered in a manner consistent with the establishment of religious provision of the first amendment of the Constitution." *Id.* at 37 (quoting memorandum from Department of Health, Education, and Welfare).

It is in pursuit of these aims, and with these safeguards, that the program at issue here developed. For almost 20 years New York City, funded by the federal government, has been providing basic remedial education

to hundreds of thousands of educationally deprived poor children—children who would otherwise go without it. Some 20,000 of these children (in the 1981-1982 school year) attended private school. New York has been conscientious in satisfying the statute's central command of equitable treatment for all eligible children.

The record in this case demonstrates that the Title I program in New York City, like that nationwide, has been highly successful. The improved performances of participants in the on-premises program bear eloquent testimony to the impact this program is having on disadvantaged children in New York's nonpublic schools. See pages 13-14, *supra*.

In its opinion, the court of appeals recognized the success of the program, observing that "[w]e have no doubt that the program here under scrutiny has done much good." J.S. App. 4a. It also recognized the practical consequences of its ruling that disadvantaged schoolchildren attending religiously oriented schools are foreclosed from receiving remedial assistance from Title I teachers at their school. The court "ha[d] no doubt" that the local school authorities "could reasonably have regarded" the on-premises program "as the most effective way to carry out the purposes of the Act." J.S. App. 4a. Indeed, the court concluded that "[w]hile other ways of using Title I funds for the benefit of students in religious schools can be found, these * * * are *almost certain to be less effective, more costly, or both.*" J.S. App. 52a (emphasis added).

The record graphically substantiates and quantifies the court of appeals' conclusion. See pages 9-11, *supra*. Additional transportation and other noninstructional costs alone would consume some $4.2 million (in 1977-1978 figures)—more than 42% of the budget for the nonpublic school Title I program. In human terms, this would mean that more than 5,000 children—a number equivalent to 36 out of every hundred nonpublic school students now being served—would be forced out of the

program.[14] And for those children who continued to be served, as the court of appeals recognized (J.S. App. 7a-8a, 52a), the Title I services would almost certainly be less effective. See J.A. 34-37, 63-64, 66-68; C.A. App. A28-A31, A60, A62-A64; Dane Affidavit ¶¶ 12-17, DX U, Tab A-1, at 6-9. Moreover, if—as seems likely[15]—remedial instruction under a revised program would have to take place after regular school hours, experience documented in the record shows that attendance may be expected to be poor, and that both teachers and students may be expected to be too tired for the program to be effective. See pages 9-11, *supra*. The judgment below would thus result in clear and well-documented injury to thousands of disadvantaged youngsters.

On the other hand, the court of appeals recognized that, under the detailed, 16-year record compiled and examined by two district courts, the efforts of the program "to prevent the public school teachers and other professionals whom it sends into religious schools from giving sectarian instruction or otherwise fostering religion" have been "largely successful." J.S. App. 4a. In particular, the court did not overturn the factual finding of the district court in *PEARL* (J.S. App. 97a), adopted by the district court below (J.S. App. 56a), that the Title I program in New York City had successfully

---

[14] Even under the existing program, resources are too scarce to serve all eligible children. In the 1981-1982 school year, only 21,000 out of 40,120 eligible nonpublic school students received Title I remedial services. J.A. 38, 81; C.A. App. A32, A80.

[15] Title I "evinces a clear intention that state constitutional spending proscriptions not be pre-empted as a condition of accepting federal funds." *Wheeler* v. *Barrera*, 417 U.S. at 417 (footnote omitted). New York authorities concluded that to permit nonpublic school students to participate with public school students at the public schools during the school day might violate Article XI, Section 3 of the New York Constitution. J.S. App. 8a. Accordingly, if the judgment below is sustained, the most likely result would be to return to a system of transporting nonpublic schoolchildren to public schools for remdial instruction after school hours—a system New York and other school districts have concluded is a "total failure" (J.A. 63; C.A. App. A60).

avoided "an 'impermissible fostering of religion'" without "the 'continuing surveillance' deemed necessary in *Meek*." The court of appeals accurately summarized the evidence in the case when it commented that the program "apparently has done * * * much good and little, if any, detectable harm." J.S. App. 52a.

This case does not involve a casual program, lightly entered into or easily abandoned. The program invalidated by the court below represents a central feature of federal educational policy, now almost 20 years old, established and refined with rare unanimity by successive Congresses whose deliberations demonstrated full understanding and sensitivity to the church-state problems involved. It is a program of major significance to New York and like communities across the nation, which have, after extended experience and experimentation, determined that an on-premises program is virtually the only effective means for providing comparable services to disadvantaged nonpublic school students. And thousands of disadvantaged children have gained precious opportunity from this program; they stand to lose grievously if the decision below is affirmed.

Under these circumstances, appellees bear a heavy burden of persuasion that this major program, which has been shown on the record to have been so needed and successful and at the same time to have occasioned no "detectable harm" to First Amendment values, should be held unconstitutional. If "'the measure of constitutional adjudication'" in the Establishment Clause area "'is the ability and willingness to distinguish between real threat and mere shadow'" (*Marsh* v. *Chambers*, No. 82-23 (July 5, 1983), slip op. 11, quoting *Abington School District* v. *Schempp*, 374 U.S. 203, 308 (1963) (Goldberg, J., concurring)), appellants here are entitled to wonder where the "real threat" from this program lies.

C. An Analysis Of The Record Demonstrates That New York's Title I Program Has A Legitimate Secular Purpose, Does Not Impermissibly Advance Religion, And Has Not Occasioned An Excessive Entanglement Between Church And State

1. *Purpose.* It is neither disputed nor disputable that Title I is animated by a legitimate and admirable secular purpose: providing enhanced educational opportunites for disadvantaged children. See *PEARL*, J.S. App. 76a-77a. Appellees have so conceded (C.A. Br. 20).[16]

The specific decision to provide Title I services to nonpublic school students on the premises of the nonpublic schools is also the product of solely secular considerations. As detailed above (see pages 9-11, *supra*), the New York City Board of Education decided to provide Title I services on the premises of private schools only after other alternatives were considered and unsuccessfully attempted. These alternatives—providing services off the premises or after school hours—would serve fewer students and serve them less effectively. Dane Affidavit ¶¶ 12-17, DX U, Tab A-1, at 6-9. In some circumstances, the alternatives have been found to fall short of the statutory requirements of comparable services. See page 10 & n.9, *supra*. Consequently, the Board turned to the present method as the only feasible means to provide children in nonpublic schools with Title I educational services comparable to those in public schools. See J.A. 63-68; C.A. A59-A64; J.S. App. 7a-9a, 71a-73a.

2. *Effect.* The Title I program "is working as Congress intended it should" (H.R. Rep. 95-1137, *supra*, at 5 (quoting testimony before the committee)). The primary effect of the program has been exactly that envisioned by

---

[16] This Court has recognized that the welfare of all residents is enhanced by government programs that endeavor to provide for all schoolchildren, including those attending nonpublic schools, "a fertile educational environment" (*Wolman* v. *Walter*, 433 U.S. 229, 236 (1977)), and an "ample opportunity to develop to the fullest their intellectual capacities" (*Meek* v. *Pittenger*, 421 U.S. at 352 n.2). See also *Mueller* v. *Allen*, No. 82-195 (June 29, 1983), slip op. 5-6; *Committee for Public Education & Religious Liberty* v. *Regan*, 444 U.S. 646, 654 (1980).

Congress: to improve the educational opportunities of educationally disadvantaged youngsters in low-income areas. The results of the New York on-premises program, discussed at pages 13-14, *supra*, fully substantiate the beneficial secular effects of the program.[17]

It is also undeniable that the primary effect of the program has been neither to advance nor to inhibit religion. This is because, as is required by the governing statute, comparable services are provided to eligible schoolchildren whether they attend public or nonpublic schools. If Title I services were provided solely to nonpublic school students, it might be said that the program had the effect of promoting religious education. Conversely, if Title I services were withheld from students attending religiously oriented schools, it might be said that the program had the effect of discriminating against religion. As it is, the effect of the program is absolutely neutral. See *Mueller* v. *Allen*, No. 82-195 (June 29, 1983), slip op. 8-10, distinguishing *Committee for Public Education & Religious Liberty* v. *Nyquist*, 413 U.S. 756 (1973).[18]

Before this Court is a record documenting the actual operation of the New York Title I program since its

---

[17] Thus, even if there are benefits to religion stemming from the Title I program (and none can be found from the record), such effects are surely " 'indirect,' 'remote,' or 'incidental' " in comparison with the successful and well-documented record of secular achievement under this program for disadvantaged students. See *Lynch* v. *Donnelly*, No. 82-1256 (Mar. 5, 1984), slip op. 13, quoting *Committee for Public Education & Religious Liberty* v. *Nyquist*, 413 U.S. 756, 771 (1973).

[18] See also, *e.g.*, *Widmar* v. *Vincent*, *supra*; *Walz* v. *Tax Commission*, 397 U.S. 664 (1970); *Board of Education* v. *Allen*, *supra*; *Americans United for the Separation of Church & State* v. *Blanton*, 433 F. Supp. 97 (M.D. Tenn.), aff'd, 434 U.S. 803 (1977) (statute providing aid to all needy college students, including those in religious colleges, does not have prohibited effect on religion). Cf. *Sloan* v. *Lemon*, 413 U.S. 825, 832 (1973) (state tuition grant scheme only for benefit of parents with children in private schools found unconstitutional for "singl[ing] out a class of its citizens for a special economic benefit").

inception. That record reveals that, during the program's 16-year documented history, there has been no known instance of any Title I teacher or professional succumbing to religious influences by introducing religious materials into the Title I classroom, becoming involved in the nonpublic schools' religious activities, or being pressured by nonpublic school personnel to compromise the secular character of the Title I program. J.A. 52, 80-81; C.A. App. A47, 479. Indeed, the danger of Title I employees inculcating religion is remote because most teachers do not share the religion of the schools to which they are assigned and are itinerant—teaching in several schools, often of differing religious sponsorship. See page 11, *supra*.[19]

It must be stressed, in connection with the "effects" inquiry, that Title I services are provided directly "to educationally deprived *children* rather than to specific schools." *Wheeler* v. *Barrera*, 417 U.S. at 406 (emphasis in original). No tax-funded resources are placed at the disposal of religious school authorities.[20] This distin-

---

[19] Appellees contend (C.A. Br. 40-43; Geller Affidavit, J.A. 232-233; C.A. App. A256-A257; see Motion to Affirm or Dismiss 17-18) that the on-premises program has benefitted religion because the public school professionals working in the program have been induced by the religious atmosphere of the nonpublic schools, or by their contacts with nonpublic school faculty, to introduce religion into their teaching. The simple answer to this is that there is not a shred of evidence in the record to support this supposition, and the district courts to consider the argument flatly rejected it on the record. As the *PEARL* court found (J.S. App. 97a (emphasis in original)), the Title I instructors here "*have not* fostered religious views or advanced religious activities." See also J.S. App. 56a-57a, 91a-92a.

[20] In this respect, the program at issue here is less problematic than the payments for administration of state-controlled tests upheld in *Committee for Public Education & Religious Liberty* v. *Regan*, *supra*, or the textbooks upheld in *Mueller* v. *Allen*, *supra*, and *Meek* v. *Pittenger*, 421 U.S. at 359-362. The governing principle is that resources that are inherently capable of diversion to use for religious instruction must not be placed under the control of religious school authorities. *Wolman* v. *Walter*, 433 U.S. at 250-251.

guishes the Title I program from many others invalidated by this Court. As the Court pointed out in *Mueller* v. *Allen*, slip op. 10, it is "noteworthy that all but one of [the Court's] recent cases invalidating state aid to parochial schools have involved the direct transmission of assistance from the state to the schools themselves." [21] See also *Lemon* v. *Kurtzman*, 403 U.S. 602, 621 (1971) (provision of direct aid to nonpublic schools was a "factor [that] distinguishes both *Everson* and *Allen*, for in both those cases the Court was careful to point out that state aid was provided to the student and his parents—not to the church-related school"); *Walz* v. *Tax Commission*, 397 U.S. 664, 675 (1970) (noting difficulties presented by "direct money subsidy" program).[22]

As discussed at pages 7-8, *supra*, Title I and the implementing regulations are carefully designed to ensure that no financial aid, materials, or services are provided to the nonpublic schools themselves. This is in accordance with clear congressional directives from the

---

Resources that are inherently secular may be used by nonpublic school authorities so long as nonpublic school students are treated on an equal basis with public school students. *Id.* at 240-241; *Regan*, 444 U.S. at 654-657; *Meek*, 421 U.S. at 359-362. Here, the problem of distinguishing between inherently secular materials and materials that can be diverted to religious use does not arise; all Title I resources are selected by and remain under the exclusive control and direction of public school authorities.

[21] The sole exception is *Committee for Public Education & Religious Liberty* v. *Nyquist*, *supra*, which involved a government aid program designed exclusively for the benefit of parents with children in nonpublic schools, rather than a general program for the benefit of all schoolchildren.

[22] Of course, even a direct governmental subsidy to a parochial school is not necessarily unconstitutional. See *Committee for Public Education & Religious Liberty* v. *Regan*, *supra*; *Roemer* v. *Board of Public Works*, 426 U.S. 736 (1976); *Tilton* v. *Richardson*, 403 U.S. 672 (1971). Cf. *Marsh* v. *Chambers*, *supra* (upholding constitutionality of direct government payments to legislative chaplains); *Bradfield* v. *Roberts*, 175 U.S. 291 (1899) (upholding constitutionality of federal aid to hospitals operated by a religious order).

beginning of the program. See S. Rep. 89-146, *supra*, at 11. Most important is the requirement that Title I funding be used "only to provide services that supplement the level of services" that would otherwise be provided to the eligible schoolchildren. 34 C.F.R. 200.72(a); see 20 U.S.C. 2736(c), 3807(b).[23] The "supplement, not supplant" provisions of the law ensure that Title I will not relieve the nonpublic[24] schools of any of their educational and financial obligations. The record shows that, in deciding what Title I services to provide, the Board "has been guided by the statutory requirement that those services supplement, and not supplant, instruction and instructional services already being provided by the nonpublic schools themselves." J.A. 44; C.A. App. A39.[25]

In conclusion: two district courts have engaged in a searching investigation and analysis of the actual "effects" of the New York City program at issue here. Guided by the precedents of this Court, they concluded that that program does not have the impermissible effect

---

[23] Local educational agencies are also required to maintain administrative control of all equipment and supplies acquired with Title I funds. 34 C.F.R. 200.74(a); see S. Rep. 89-146, *supra*, at 12. Cf. *Wolman* v. *Walter*, 433 U.S. at 250 (loan of instructional materials and equipment to nonpublic school students invalid because, as a practical matter, the materials would be available for use by the religious schools). Title I teachers are instructed to keep such equipment and supplies, when not being used, locked in separate storage. The record in this case shows that the New York Title I program fully complies with these requirements. J.A. 55-57; C.A. App. A51-A53.

[24] It should be noted that the "supplement, not supplant" provisions apply to *public* schools as well. See 20 U.S.C. 2736(c), 3807(b); 34 C.F.R. 200.62; see also *Bell* v. *Kentucky*, cert. granted, No. 83-1798 (Oct. 1, 1984). Congress intended that Title I funds only be used to improve the education of disadvantaged children, and not be "diverted to meeting other needs of school systems, however pressing those other needs may b[illegible] S. Rep. 91-634, 91st Cong., 2d Sess. 10 (1970); see also *id.* at 14.

[25] For example, the Board decided against providing speech improvement and library services because of the danger that these services might constitute aid to the institutions rather than to children. J.A. 44; C.A. App. A39.

of advancing religion. "[T]he substantial evidentiary record compiled in this case * * * demonstrates to the Court's satisfaction that the program has remained free from religious influence and has not promoted the religious mission of the nonpublic schools" (*PEARL*, J.S. App. 85a). The court of appeals did not disturb this finding, and it should be upheld by this Court.

3. *Entanglement.* The Title I program is so structured that there is no jurisdictional overlap between public and religious authorities, and little contact between them. Public authorities exercise no control over the activities or personnel of the religious schools (in contrast to *Lemon* v. *Kurtzman*, *supra*) (J.A. 62; C.A. App. A58; see J.S. App. 99a), and the religious school authorities exercise no control whatsoever over the activities or personnel of the Title I program (J.A. 46-49, 52-55; C.A. App. A41-A44, A48-A51). The result is that there is no "excessive entanglement" between religious and governmental authorities.

The three-judge district court in *PEARL* aptly described the provision of services to nonpublic school students here as a "school within a school." J.S. App. 98a, quoting Larkin Affidavit ¶ 107, DX U, Tab A-4. The court found that the Title I classrooms "are free from religious influences and are distinct from the facilities used by the nonpublic school for regular instructional activities." J.S. App. 98a. The court further found that "Title I supervisors maintain a complete separation between Title I activities and the regular programs of the parochial schools." *Id.* at 98a-99a.

The testimony of Title I administrators, teachers, and support professionals in this case shows that Title I personnel are given guidelines stressing the program's independence from the nonpublic schools. They are instructed that the Title I program is separate from and independent of the nonpublic schools' program, and that, as public employees, their role is purely public and secular. This uniform testimony, of record in this case, demonstrates that the Title I personnel fully comprehend and

strictly adhere to these guidelines restricting their own activities and the use of materials, and that they view the Title I remedial program and their role as independent of the instructional program of the nonpublic schools. See J.A. 50-51, 52-55; C.A. App. A45-A46, A48-A51; *PEARL*, J.S. App. 97a.

The few administrative contacts between Title I personnel and the teachers or officials of the nonpublic schools do not constitute excessive entanglement. These contacts fall into three categories: (1) disseminating information about Title I to the administrators, (2) processing requests for services, and (3) resolving scheduling problems and other questions concerning the implementation of the program (J.A. 59; C.A. App. A55). These routine administrative interactions do not give parochial school officials any control over the program, nor involve Title I personnel in the affairs of the parochial schools. *PEARL*, J.S. App. 100a. The Title I supervisors have only casual and periodic contact with nonpublic school administrators and little, if any, contact with nonpublic school teachers. Title I supervisors review and evaluate only the performance of the Title I teacher in the Title I classroom, and neither the parochial school program nor its instructional material is subject to public examination. *PEARL*, J.S. App. 99a; see generally J.A. 59-63; C.A. App. A55-A59.

These minimal contacts scarcely reflect the degree of intrusiveness by government authority that this Court has cautioned against as amounting to impermissible entanglement. Cf. *Walz* v. *Tax Commission*, 397 U.S. at 674-676 (routine administrative contacts between government and religiously affiliated institutions do not constitute entanglement); *Mueller* v. *Allen*, slip op. 14 (same). And, as the Court explained in *Committee for Public Education & Religious Liberty* v. *Regan*, 444 U.S. 646, 660-661 (1980) (footnote omitted), when the administrative contacts are of the kind that are "straightforward and susceptible to * * * routinization," there is no excessive entanglement on the face of the plan, "and

we are not prepared to read into the plan as an inevitability the bad faith upon which any future excessive entanglement would be predicated." [26]

There remains the question whether the *prevention* of impermissible effects in this context has brought about "[a] comprehensive, discriminating, and continuing state surveillance," such as would constitute an excessive entanglement under this Court's decision in *Lemon* v. *Kurtzman*, 403 U.S. at 619. It is this aspect of the entanglement inquiry—and this aspect alone—that caused the court of appeals to conclude that, despite the practical educational considerations and the weight of congressional judgment, remedial instruction and related counseling services may be provided to students attending religiously oriented schools "only if such instruction or services are afforded at a neutral site off the premises of the religious school" (J.S. App. 35a-36a).

The court of appeals concluded that to "be sufficiently certain that public employees, in a program like the present one, will maintain strict religious neutrality, they and the institutions in which they work must be subjected to 'comprehensive, discriminating and continuing state surveillance.'" J.S. App. 36a, quoting *Lemon* v. *Kurtzman*, 402 U.S. at 619. This need for surveillance arises, according to the court, because "[t]eachers and those who provide clinical and guidance services of the sort here at issue are engaged in occupations in which the performance of one's duties may be subtly and all too easily influenced by a sectarian milieu." J.S. App. 36a (footnote omitted). See also J.S. App. 38a (problem is that a public school teacher may "succumb[] to, or indeed em-

---

[26] The consultations between Title I teachers and regular private school teachers "concerning the students' needs and progress" (J.S. App. 12a) would occur even if Title I classes were taught solely on the premises of public schools. Any public welfare agency that deals with a sectarian school student may have occasion to consult with his teachers. Such unexceptional professional contacts between public and private authorities have never been thought to give rise, as a matter of law, to unconstitutional government entanglements with religion.

brace[], the religious influences that bear on anyone offering instruction or guidance in rooms that are part and parcel of a religious school").

In so holding, the court did not rely on the record evidence. The opinion of the court includes no reference to any evidence concerning the actual level of "surveillance" involved in the Title I program.[27] Indeed, the court expressly declined to address "the merits of th[e] argument" that the record here affirmatively negates any supposition of an excessive degree of entanglement stemming from such surveillance (J.S. App. 53a). The holding below was based entirely on the court's "reasoned apprehension of potentials" (J.S. App. 41a) and—more directly—on an analogy to this Court's decision in *Meek* v. *Pittenger, supra.*

There is a striking incongruity between the weighty considerations supporting this important program and the court's speculative, even chimerical, basis for striking it down. With all respect, we believe that the esoterica of the court of appeals' First Amendment jurisprudence have gotten in the way of the ultimate inquiry—whether the program here "establishes a religious faith, or tends to do so." *Lynch* v. *Donnelly*, No. 82-1256 (Mar. 5, 1984), slip op. 8-9. The concerns of the court of appeals, if they are real at all, seem exceedingly remote from the purposes of the Establishment Clause. As explained in *Lemon* v. *Kurtzman*, 403 U.S. at 614, the purpose of the "entanglement" inquiry is "to prevent, as far as possible, the intrusion of either [church or state] into the precincts of the other." Justice Brennan has further explained that this purpose is "to keep the state from interfering in the essential autonomy of religious life." *Marsh* v. *Chambers*, slip op. 9 (dissenting opinion). The concern about intru-

---

[27] Interestingly, appellees agree with us that the degree of surveillance occasioned by the New York Title I program is minimal. See Appellees' Motion to Affirm or Dismiss 11, 33-34, 38. If appellees are correct, then the program cannot be invalidated on the basis of excessive entanglement stemming from prophylactic surveillance. If there is a constitutional infirmity, it must be found in the program's effects. But see pages 28-33, *supra.*

sive surveillance is simply one element bearing on this purpose. It was first identified in *Lemon* v. *Kurtzman*, *supra*, in the context of cash salary supplements for *full-time religious school teachers*. There, the surveillance in question pertained to individuals "under religious control and discipline" (403 U.S. at 617); in a very real and direct sense, the surveillance constituted "excessive and enduring entanglement between state and church" (*id.* at 619). The government has no business overseeing the agents of the church to ensure that they do not commit religion.

By contrast, the surveillance at issue here involves only *public school* teachers and *public school* authorities.[28] Such surveillance obviously entails no relationship between the government and religious authorities. It is no different, in principle, from the "surveillance" that may be necessary to ensure that teachers in the public schools comply with this Court's school prayer decisions. The Constitution does not prohibit entanglement between the government and its employees.[29]

---

[28] The court of appeals also mentioned surveillance of "the institutions in which [the teachers] work" (J.S. App. 36a). We do not know what the court was referring to. The record affirmatively demonstrates (J.A. 62; C.A. App. A58) that the public school authorities did not interfere with "the nonpublic schools' control over their internal affairs, curriculum, course content, or faculty qualifications or performance." Perhaps the court was concerned by the prospect of Title I supervisors " 'prowling the halls' " of the nonpublic schools (J.S. App. 43a, quoting *Lemon* v. *Kurtzman*, 403 U.S. at 650 (Brennan, J., concurring)). However, the record does not reflect any friction caused by the occasional visits by Title I supervisors to Title I classrooms, and the "entanglement" resulting from these visits would seem to be less intrusive than that occasioned by public regulatory programs, such as state accreditation requirements or fire and building safety codes. The nonpublic school has no obligation under Title I other than to supply a classroom in specified condition and to allow access to that classroom by teachers and supervisors; there is accordingly no reason for a Title I supervisor to examine anything other than that classroom.

[29] In *Wolman* v. *Walter*, 433 U.S. at 246-248, this Court upheld off-premises remedial instruction by public school teachers of classes composed entirely of sectarian school students. There is

The court of appeals' approach to the entanglement issue was marked by another, analytical, flaw. The question of "excessive entanglement" is, inevitably, a correlative of what is necessary to prevent impermissible "effects." The question is whether the prevention of an impermissible effect ("advancing religion") entails an excessive degree of entanglement. In this case, this reduces to the specific issue of what sort and degree of "surveillance" is necessary to prevent trained public school professionals from "succumbing" to the "sectarian milieu" of the nonpublic school. This is fundamentally an empirical question. It simply cannot be answered on an a priori basis. And where, as here, there is an extensive factual record bearing on the issue, it is a profound mistake to refuse to examine the evidence and to rely on conclusory presumptions about the degree of surveillance that *might be* necessary to prevent the teachers from "succumbing" and turning the Title I program into a forbidden advancement of religion. See J.S. App. 39a.

The court of appeals did not seriously suggest (and appellees do not contend) that the degree and kind of surveillance that was actually carried out in New York City over the Title I teachers now teaching in private schools constituted an excessive entanglement.[30] Nor did the court find any impermissible "succumbing." But if the present degree of surveillance does not constitute an excessive entanglement, and has not in fact had imper-

---

no reason to presume that, merely because such a class is conducted on nonpublic school premises, the government's supervision of its own employees would become an "excessive entanglement" with religion.

[30] A certain degree of surveillance or entanglement is tolerable and may be inevitable. "The test is inescapably one of degree." *Walz* v. *Tax Commission*, 397 U.S. at 674; see *Lynch* v. *Donnelly*, slip op. 14. Only entanglements that are "excessive" are proscribed. *Mueller* v. *Allen*, slip op. 14; *Lemon* v. *Kurtzman*, 403 U.S. at 613. This corresponds to the fact that "not every law that confers an 'indirect,' 'remote,' or 'incidental' benefit upon [religion] is, for that reason alone, constitutionally invalid." *Lynch* v. *Donnelly*, slip op. 13 (brackets in original), quoting *Committee for Public Education & Religious Liberty* v. *Nyquist*, 413 U.S. at 771.

missible effects, why should we presume that much more surveillance is necessary to prevent these effects?

A purely hypothetical approach to both effects and entanglement has the result of invalidating any program of assistance to religious institutions or individuals attending them. Cf. *Wolman* v. *Walter*, 433 U.S. at 262 (Powell, J., concurring in part). Where a program has operated for 16 years or more without any untoward consequences, and this has been accomplished without "comprehensive, discriminating and continuing state surveillance" (*Lemon* v. *Kurtzman*, 403 U.S. at 619), it suggests very strongly that entanglement problems are largely imaginary.

4. *The Authority of Meek v. Pittenger.* The court of appeals based its conclusion that the New York City Title I program is unconstitutional on what it deemed to be the compelling authority of *Meek* v. *Pittenger*, *supra*. J.S. App. 4a.[31] Moreover, the court felt that *Meek* required that it so hold *without* examining "the merits of th[e] argument" that the surveillance of the public school teach-

---

[31] The court of appeals stated (J.S. App. 4a) that it also relied on *Public Funds for Public Schools* v. *Marburger*, 358 F. Supp. 29 (D.N.J. 1973), aff'd, 417 U.S. 961 (1974), and *Wolman* v. *Walter*, *supra*. Neither precedent supports the result below.

Marburger, a summary affirmance, involved a program in which public funds were provided to nonpublic schools to enable *them* to hire public school personnel for remedial services they deemed appropriate. The *Marburger* program, therefore, was essentially under the control of the religious school authorities rather than the public schools. The program here is plainly distinguishable. See pages 30-32, 33, *supra*.

Wolman v. *Walter*, *supra*, does not support the court of appeals' rigid interpretation of *Meek*. Indeed, the Court in *Wolman* upheld the provision of diagnostic educational services by public school personnel on the premises of nonpublic schools, as well as the provision of other remedial educational services to nonpublic school students at ideologically neutral sites off the premises. The *Wolman* decision thus supports our view that questions of this sort must be decided on the basis of a flexible and careful analysis of the practical realities of the situation, rather than on inflexible per se rules. See pages 40-41, *infra*.

ers in this case did not rise to the level of impermissible entanglement (J.S. App. 53a).

Even if the court of appeals were correct that *Meek* compels a lower court to reach so unfortunate a result (and we think it was not), this Court is not so constrained.[32] *Meek* may well provide a close factual analogy to this case. But there is every reason to hesitate before reading *Meek* as an irrevocable commitment to a rigid per se rule barring the lower courts from conducting an inquiry into the actual facts and realities of particular on-premises programs. Just one year before *Meek*, in *Wheeler* v. *Barrera*, *supra*, the Court was faced with the question of the constitutionality, in the abstract, of an on-premises Title I program. The Court declined to decide the question in the abstract, stating that it should be decided on the basis of "a careful evaluation of the facts of the particular case." 417 U.S. at 426. The Court observed that "the First Amendment implications may vary according to the precise contours of the plan that is formulated." *Ibid.* The Court stated that "a program whereby a former parochial school teacher is paid with Title I funds to teach full time in a parochial school undoubtedly would present quite different problems than if a public school teacher, solely under public control, is sent into a parochial school to teach special remedial courses a few hours a week." *Ibid.* A rigid interpretation of *Meek* would, however, render any such considerations irrelevant. We seriously doubt that the Court, one year after being so cautious in *Wheeler*, intended in *Meek* to adopt a per se rule that effectively preordains the outcome of this and every other on-premises case.

Two terms after *Meek*, in *Wolman* v. *Walter*, *supra*, the Court demonstrated that it did not view *Meek* as precluding analysis of the facts of the particular case. There, the Court addressed the constitutionality of pro-

---

[32] If this Court were to conclude that *Meek* cannot be distinguished from this case, we believe that it would be appropriate for the Court to consider whether *Meek*, as so interpreted, should be overruled.

viding diagnostic services to nonpublic school students on the premises of their schools. An absolutist interpretation of *Meek*—*i.e.*, that the danger of public school personnel succumbing to the sectarian atmosphere of the church-related school is so great that constitutionally excessive surveillance is necessarily required to prevent it—would logically have resulted in invalidation of the program. But the program was in fact upheld. 433 U.S. at 241-244. And the provision of therapeutic services in "religiously neutral locations" was upheld simply because of the Court's judgment, on the record, that "the danger perceived in *Meek* does not arise" in such circumstances. *Id.* at 247. The Court recognized the importance of a "*practical response* to the logistical difficulties of extending needed and desired aid to all the children of the community" (*id.* at 247 n.14) (emphasis added)).

More recently, in *Committee for Public Education & Religious Liberty* v. *Regan*, 444 U.S. at 661 (citations omitted), this Court explicitly rejected the broad interpretation of *Meek* on which the court below relied:

> *Meek* v. *Pittenger* * * * is said to have held that any aid to even secular educational functions of a sectarian school is forbidden, or more broadly still, that any aid to a sectarian school is suspect since its religious teaching is so pervasively intermixed with each and every one of its activities. * * * [T]hat case was simply not understood by this Court to stand for [such a] broad proposition.

We therefore seek an understanding of *Meek* that is narrower and more consistent with this surrounding legal texture. In this spirit, we note several significant differences between *Meek* and the instant case. First, the Title I program is governed by detailed regulations and guidelines that are made known to Title I personnel and the nonpublic schools as well. See pages 6-8, 12, *supra*. This has the beneficial effect of routinizing the conduct of the program and eliminating the need for ad hoc judgments about the relations between the religious school and the Title I program. See *Regan*, 444 U.S. at 660 (upholding

program where it is "straightforward and susceptible to routinization"). In sharp contrast, the program in *Meek* (as the Court observed) had "the potential for provoking controversy between the Commonwealth and religious authorities over the extent of the teachers' responsibilities and the meaning of the legislative and administrative restrictions on the content of their instruction." 421 U.S. at 372 n.22.

Second, the Title I program is designed to be a flexible means for accomplishing an important public purpose. On-premises programs are permitted only to the limited extent necessary to fulfill those purposes. The record here shows that New York adopted the on-premises approach only as a last resort. See pages 9-11, *supra*. By contrast, the Pennsylvania program at issue in *Meek* was limited by statute to on-premises services. See 421 U.S. at 367 ("the services are provided only on the nonpublic school premises"). This factor bears heavily on whether the decision to provide on-premises services is made on truly educational grounds, rather than for the convenience or assistance of the nonpublic schools. See *Wheeler* v. *Barrera*, 417 U.S. at 428 (Powell, J., concurring) (emphasis added) ("I would have serious misgivings about the constitutionality of a statute that *required* the utilization of public school teachers in sectarian schools.").

Third, the Title I program is a single statutory scheme that provides aid to students in both public and nonpublic schools according to a fixed statutory formula. See 20 U.S.C. 3806(a). This obviates any possibility that the program might foster chronic controversy over the amount of aid to be given to nonpublic school students. In fact, in its nearly 20 years of operation, Title I has not precipitated religious debate in the political arena; the concept of equitable treatment of nonpublic school students has enjoyed widespread and virtually unanimous support.[33]

[33] The three-judge court in *PEARL* found that the evidence showed no political divisiveness over the inclusion of nonpublic school students in the New York Title I program. J.S. App. 101a-102a. Nor has there been such divisiveness at the federal level. Equitable participation by nonpublic school students was an in-

By contrast, the program in *Meek* established aid for public and nonpublic school students through separate statutory schemes requiring separate annual appropriations decisions. See 421 U.S. at 352, 372. This created risks of "repeated confrontation between proponents and opponents of the * * * program [and] * * * political fragmentation and division along religious lines" (*id.* at 372).

Finally, the most important distinction between this case and *Meek* is the procedural posture in which the two cases arose. This case comes to the Court after a full trial on the merits by two district courts, with an extensive factual record covering a period of 16 years of Title I operations. By contrast, *Meek* came to this Court on review of a decision by a three-judge district court, upholding the program on a sparse evidentiary record. Because the *Meek* program had been in existence for barely a year at the time of the sole evidentiary hearing, the record contained little about its actual operation.

In *Meek*, therefore, this Court was asked to rely on the "good faith" and professionalism of the Pennsylvania teachers. 421 U.S. at 369. Here, the Court has the benefit of a record that demonstrates that Title I personnel "*have not* fostered religious views or advanced religious

---

trinsic requirement of the program at its inception in 1965 (see S. Rep. 89-146, *supra*, at 11-12). Since that time, Congress has twice amended Title I to strengthen the nonpublic school participation requirement. See pages 5-6, *supra*. There has never been any serious effort in Congress to depart from this aspect of the program. It can be expected that a forced exclusion of nonpublic school students from equitable participation in the Title I program would engender far more controversy than has their inclusion.

If the potential for "political divisiveness" is considered to be a "warning signal" for entanglement problems (see *Nyquist*, 413 U.S. at 797-798), then the rare and striking unanimity in the Congress that nonpublic school students should be permitted to participate in the Title I program on a comparable basis to public school students might logically serve as a "reassuring signal" that this program steers clear of the "evil[s] addressed by the Establishment Clause" (*Lynch* v. *Donnelly*, slip op. 3 (O'Connor, J., concurring)).

activities" (*PEARL*, J.S. App. 97a (emphasis in original)). As the district court below stated (J.S. App. 56a-57a):

> although arguably some of the circumstances of the Title I program parallel the State program in *Meek*, the direct evidence demonstrates that the concerns of the *Meek* Court about the potential for the unconstitutional mingling of government and religion in the administration of this type of program have not materialized. Undoubtedly, the Supreme Court will not ignore direct evidence of how Title I has functioned and operated in New York City's nonpublic schools for some seventeen (17) years in favor of plaintiffs' conjecture about the possibility of unconstitutional governmental activity inherent in the arrangements of this program.

D. The Court Of Appeals' Reasons For Refusing To Consider The Evidentiary Record Were Misconceived

The court of appeals offered a litany of reasons why its hypothetical conclusion of excessive entanglement should not "yield to the considerable evidence concerning the actual workings of the City's provision of on-premises remedial instruction and guidance services" (J.S. App. 37a). None of them can withstand analysis.

The court first opined (J.S. App. 38a) that the failure of the record to reflect evidence that Title I was in fact used to foster religion merely shows that it is difficult to "prove a negative"; in the same vein, the court later (J.S. App. 41a) asserted that to rely on the fact that "no harm has been proved to have been done in the past is a fundamentally wrong approach," that there is "no guarantee" that the secular approach of the current Title I administrators will continue, and that the plaintiffs cannot be "expected to mount perpetual guard." These statements demonstrate, we believe, that the court of appeals arbitrarily reallocated the burden of proof in this case to defendants, in order to spare the plaintiffs the necessity of proving, now or in the future, the existence of unconstitutional practices. But there is no warrant in law for such a reallocation of the burden of proof.

It is particularly inappropriate here because it leads to a presumption of the unconstitutionality of a major congressional program. Cf. *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 354-355 (1936) (Brandeis, J., concurring); *Trustees of Dartmouth College* v. *Woodward*, 17 U.S. (4 Wheat.) 518, 625 (1819).[34] And, as already detailed, this Court has clearly indicated in *Wheeler* v. *Barrera*, *supra*, that a "careful evaluation of the facts" of the particular case is not only appropriate but necessary.[35]

---

[34] The court of appeals also objected that appellants' arguments based on the record "too often invoke 'mosts' and averages" (J.S. App. 40a), pointing particularly to the figures (see page 11, *supra*) with respect to the religious affiliations of Title I teachers and the amount of time they spend in any particular religious school. But the fact that these figures fall short of perfection simply raises the question whether the district court's findings of fact were clearly erroneous; they do not suggest that the evidence is to be wholly disregarded. Indeed, the most important circumstance shown by all these figures is that religion is wholly extraneous and irrelevant to the administration and operations of the Title I program. The fact that, on a random basis, occasionally a public school teacher who happens to be Catholic will end up teaching Title I remedial math in a Catholic school does not show that religion has been "established," in the absence of at least some modicum of *evidence* that remedial math has in fact been turned to a religious use. The legal question is not whether the record absolutely precludes entanglement, but whether it shows with "sufficient clarity" that the program serves "legitimate secular ends" without "appreciable risk of being used to transmit or teach religious values." *Committee for Public Education & Religious Liberty* v. *Regan*, 444 U.S. at 662.

[35] See also *Board of Education* v. *Allen*, 392 U.S. at 248 (emphasis added):

> *Nothing in this record* supports the proposition that all textbooks * * * are used by the parochial schools to teach religion. *No evidence has been offered* about particular schools, particular courses, particular teachers, or particular books. *We are unable to hold, based solely on judicial notice*, that this statute results in unconstitutional involvement of the State with religious instruction or that [the statute], for this or the other reasons urged, is a law respecting the establishment of religion within the meaning of the First Amendment.

The court further expressed the fear that "to relax" the "ban on sending public school teachers and counselors into religious schools * * * would let the genie out of the bottle" (J.S. App. 42a (footnote omitted)). Without "a principled basis on which this Court can impose a limit," the court of appeals predicted, "[c]onsiderable segments of the curriculum of the religious schools could be turned over to public school teachers" (J.S. App. 42a-43a). But there is no substantial basis for the assertion that, if the on-premises Title I program is upheld, there will remain no "principled basis" for imposing a limit. The correct line, we believe, is to permit federal aid to go on an evenhanded basis to all students as long as the provision of services is strictly supplemental and totally in the control of public authorities. The vice of promoting religion is avoided so long as the program is supplemental and evenhanded and resources that might be diverted to religious ends are not placed in the control of religious institutions. And the vice of excessive entanglement is avoided so long as there is no mixture or overlap of jurisdictions. The government must have no control over religious institutions or personnel; the religious institution must have no control over public programs or personnel. So long as these principles—which lie at the heart of this Court's Establishment Clause jurisprudence—are honored, there is little danger of the slippery slope.

The court of appeals also stated (J.S. App. 43a) that "the symbolic significance of the regular appearance of public school teachers in religious schools" may be cause for invalidating the program, suggesting that this may violate "the 'neutrality' test toward religion." But the answer is that given by the Court in *Everson*, *Allen*, *Zorach*, *Mueller*, *Widmar*, and like decisions: the government does not violate its obligation of neutrality by treating all students equally. The "symbolic significance" of evenhanded treatment of all students, we believe, exemplifies rather than subverts the spirit of the Religion Clauses. In fact, what would be deeply troubling is the

"symbolic significance" of denying access to effective remedial education for deprived youngsters who have exercised their constitutional right to choose a religious education.

E. To Deny Comparable Services To Nonpublic School Students Would Be Inconsistent With The Religion Clauses' Principles Of Evenhandedness And Accommodation

The decision of parents to send their children to nonpublic schools is, in part, an exercise of religious liberty, protected under the Free Exercise Clause of the Constitution. *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925). Their decision is entitled to respect, to toleration, to accommodation. Here they ask no more than that they not be *excluded* from a major program otherwise open to all—that they be accorded the "equitable participation" in Title I that the statute demands. Cf. *Widmar* v. *Vincent*, *supra*. Accommodation of these children by providing remedial services in the manner that is most effective as an *educational* matter is not special preference; it is simple justice. It promotes "pluralism and diversity" (*Lynch* v. *Donnelly*, slip op. 8)—the very goal and hallmark of the Religion Clauses—in the field of education.

Conversely, to deny these needed services to disadvantaged religious school pupils is to burden their exercise of a constitutional right. It generates more constitutional problems than it solves. Cf. *Sherbert* v. *Verner*, 374 U.S. 398, 404-406 (1963).

The Establishment Clause plays a harmonious role in the regime of religious liberty enshrined in our Constitution. To interpret it in so rigid and intolerant a spirit as to interfere with, rather than promote, that liberty would surely affront the intentions of the framers. It would be the ultimate constitutional irony if, in the name of one of the Religion Clauses, educationally deprived children were to be denied benefits which are central to many aspects of a successful life solely because of choices that are themselves constitutionally protected.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

REX E. LEE
Solicitor General

RICHARD K. WILLARD
Acting Assistant Attorney General

PAUL M. BATOR
Deputy Solicitor General

MICHAEL W. MCCONNELL
Assistant to the Solicitor General

ANTHONY J. STEINMEYER
MICHAEL JAY SINGER
Attorneys

OCTOBER 1984

☆ U. S. GOVERNMENT PRINTING OFFICE: 1984 461531 10071